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No. 606

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

KATHLEEN K. WILKIN,
Petitioner,

vs.

SUNBEAM CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EVERETT C. FETTIS
ROBERT C. ALLAN
One Twenty Building
Wichita, Kansas 67202
and
JOHN H. WIDDOWSON
306 Bitting Building
Wichita, Kansas 67202
and
DALE M. STUCKY*
1600 Wichita Plaza Building
P. O. Box 997
Wichita, Kansas 67202
Attorneys for Petitioner

*Counsel upon whom service is to be made.

R. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to the Court:

I. COURT OPINIONS BELOW

The opinion of the Court of Appeals has not as yet been reported. It is found on page 4 of the supplemental transcript of the record from the Court of Appeals, and is reproduced herein in the appendix, hereinafter, p. A1.

The District Court did not deliver any opinion.

A petition for rehearing in the case was denied June 12, 1967. (S.R. 7[1]).

II. JURISDICTION OF THE COURT AND GROUNDS URGED FOR ALLOWANCE OF THE WRIT

The Court of Appeals dated and filed its judgment April 20, 1967. (S.R. 5).

This Court has jurisdiction to review the judgment under the provisions of Section 1254 of the Judicial Code, 28 U.S.C., Section 1254 (1).

The petitioner urges the following grounds for allowance of the writ:

1. The decision of the Court of Appeals for the Tenth Circuit results in a conflict with a decision of another Court of Appeals on the same matter of general law, namely, *Seismograph Service Corporation* v. *Offshore Raydist, Inc.*, 135 F. Supp. 342, 263 F.2d 5, C.C.A. 5 (1958), a case of first impression in the Fifth Circuit, and this case is one of first impression in the Tenth Circuit.

2. The case is one wherein the issues are generally important, especially in regard to manufacturing enterprises and creative members of the public.

3. The decision of the Court of Appeals reflects a misunderstanding of the applicable law.

4. The decision of the Court of Appeals reflects a misunderstanding of the essential elements which the petitioner must establish to obtain relief, the Court of Appeals overlooking in one theory of recovery the basic issues agreed upon by both petitioner and respondent nec-

1. Supplemental transcript of the record.

essary for the petitioner to prove to find the respondent liable.

5. The decision of the Court of Appeals reflects a misunderstanding of the position of the petitioner throughout the case.

6. The decision of the Court of Appeals reflects a misunderstanding of the import of indisputable fact.

7. The decision of the Court of Appeals reflects a misunderstanding of the effect of the District Court's instructions to the jury.

III. THE QUESTION PRESENTED FOR REVIEW

Where a large national manufacturing corporation of household appliances receives from a housewife and school teacher through a patent attorney employee skilled in the art, a member of the Bar and charged with receiving outside submissions, disclosure of (1) a household appliance in the form of a demonstrated working model and the written specification and drawings of a pending United States patent application, a copy of which is retained by the corporation, and (2) the name of her patent attorney who is a member of the Bar, and thereafter after concerning itself with a similar household appliance and through its same patent attorney recalls her patent application and device, surreptitiously through its same patent attorney employs a skilled layman patent investigator who using an alias, without disclosing the principal, and under false pretenses obtains by first contacting her and then her patent attorney, confidential information about her yet pending patent application and household appliance, namely, that no claims are allowed in the application and that she has not been successful in commercially exploiting her household appliance, and where it uses such sur-

reptitiously obtained information in commercially manufacturing and selling its similar household appliance, is the manufacturer liable for her damages?

IV. STATEMENT OF THE CASE AND FACTS

The District Court jurisdiction was founded upon diversity under 28 U.S.C., Section 1332. (R. 2)[2].

This is a misappropriation or wrongful appropriation case. Respondent Sunbeam Corporation *after having prior knowledge and before marketing* the product in question used "improper means" to obtain from petitioner property rights in the product belonging to petitioner, and confidential information about the property rights. Sunbeam wrongfully used the improperly obtained property rights and information to its advantage. Petitioner has not been compensated for her damage. The property rights improperly obtained by Sunbeam were a device, the plans and specifications therefor, for baking and/or grilling sandwiches, small pies, and the like, and confidential information concerning this device. Sunbeam wrongfully used the property rights in marketing a device under the mark "Sunbeam Party Grill" for baking and/or grilling sandwiches, small pies, and the like. (R. 63-69).

Petitioner first brought suit in the District Court of Sedgwick County, Kansas, for misappropriation of property rights confidentially disclosed to Sunbeam in 1957, but obtained properly by Sunbeam. Removal to the Federal District Court of Kansas was effected by Sunbeam, and answer made. (R. 1-10).

During discovery petitioner learned of subsequent "improper means" activity of Sunbeam in obtaining and

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2. The Transcript of Record will herein be referred to by R. followed by a page number therein.

wrongfully using property rights and confidential information, and filed an amended complaint incorporating such. Sunbeam answered. (R. 63-73).

In view of this new evidence of "improper means" in obtaining, petitioner filed a motion for summary judgment. It was briefed by both parties and argued to the Court. Petitioner's motion was overruled. (R. 81).

Trial was had. Relative "improper means" of Sunbeam, in obtaining, the Court only instructed the jury "that should you find the defendant (Sunbeam), by employing improper means in September and/or October, 1958, obtained or acquired business information and the like from plaintiff (petitioner), then you may consider such fact along with all the other facts and circumstances you may find to exist in the case in determining whether or not plaintiff (petitioner) disclosed something in confidence to defendant (Sunbeam) which was novel to defendant and which defendant used in its Sunbeam Party Grill", and followed with an instruction relative determination of whether Sunbeam used "improper means". (R. 112). The Court refused the pertinent requested instructions of petitioner. (R. 103-104). The jury found a general verdict for Sunbeam and the Court entered judgment accordingly. (R. 117). The Court overruled the motions of petitioner for a directed verdict, judgment notwithstanding the verdict, and a new trial, and entered an order to that effect. (R. 117-118).

Petitioner takes the position that undisputed facts make Sunbeam liable as a matter of law.

Petitioner is a sixth grade school teacher, housewife and mother, and has been a resident of Wichita, Kansas, from prior to 1956 to date.

Respondent is a large national manufacturing corporation of a wide variety of products, principally electric household appliances.

Prior to 1957, petitioner conceived of a grilling and/or baking device (hereinafter referred to as the Wilkin Device) to make sandwiches and other edibles having a center filling of meat, fruit, cheese or the like, and a patent application was filed in the Patent Office. (R. 85, 109).

A working model was made of the device. (R. 8, 70, 86).

January 9, 1957, petitioner wrote Sunbeam that she had applied for patent on the Wilkin Device and if Sunbeam was interested she would forward a copy of the patent application. (PX 3-R. 397)[3]. In response, Mr. John R. Hall, a patent attorney employee of Sunbeam wrote January 16, 1957, that Sunbeam would be pleased to receive her patent application and determine if it would be interested in acquiring any rights therein. (PX 4-R. 397). In reply, petitioner wrote January 29, 1957, that her husband would be in Chicago on February 5, 1957, and could demonstrate the working model of the Wilkin Device and deliver a copy of the patent application. (PX 5-R. 398). (R. 8, 64, 65, 69, 70, 85, 88, 263).

February 5, 1957, petitioner's husband was in Chicago and demonstrated the working model of the Wilkin Device to Mr. Hall and a Mr. Neil M. Rose, who was in charge, another patent attorney employee of Sunbeam. They were authorized to recive and evaluate outside submissions. In addition, he showed and left with them copies of the patent application specification and drawings of the

3. Petitioner's exhibits will herein be referred to by PX, and where appropriate followed by R. and a page number reference to the transcript of record.

Wilkin Device. Mr. Rose noted that John Widdowson represented petitioner. (R. 8, 70, 85, 86, 264-69). (PX 25, 26, 27-R. 409-11). (PX 34-R 413). (PX 22-R 407).

February 15, 1957, Mr. Hall wrote petitioner that since it appeared that a large promotional campaign would be required in marketing the Wilkin Device, Sunbeam was not interested in acquiring any rights under her patent application. Transmitted with this letter were the copies of the patent application specification and drawings which had been left with Sunbeam. (PX 6-R. 398). Sunbeam made and retained copies. (R. 294).

In the summer of 1958, employees of Sunbeam began cooking tests, and as a result Sunbeam began to construct and assemble various models of a baking and/or grilling device for making sandwiches, small pies, and the like, which was marketed as the Sunbeam PARTY GRILL. (R. 8, 71, 85, 86, 98, 291, 293, 297).

Sunbeam through Mr. Rose, the patent attorney employee skilled in the art of electric household appliances, undertook investigation as to possible infringement by the baking and/or grilling devices. During such inquiry, he recalled and examined the file concerning submission of the Wilkin Device. Included was the address of petitioner and the name and address of John H. Widdowson, petitioner's patent attorney. (R. 20, 70, 221, 222, 223, 224, 272, 273, 290, 293, 297). (PX 22-407).

September 7th or 8th, 1958, Sunbeam, through Mr. Rose, called by long telephone a Mr. Ulmont O. Cumming, President of International Service Corporation, and requested that Mr. Cumming investigate the present status as to allowance of claims in the patent application covering the Wilkin Device and further to determine whether or not said device was being exploited commercially. (R. 231-33, 19, 20, 70, 221, 293). (PX 7-R. 399).

Mr. Cumming, while in Kansas City, Missouri, and using the name Robert Laird, contacted petitioner's residence by telephone and talked to petitioner's husband. Mr. Cumming told Mr. Wilkin that he might possibly be interested in buying petitioner's patent application covering the Wilkin Device. Mr. Wilkin then informed him John Widdowson was Mrs. Wilkin's patent attorney and should be contacted regarding the matter. (R. 230-243). (PX 8-R. 399).

Thereafter, during September and October of 1958, through correspondence between Mr. Cumming (always using the name Robert Laird) and John Widdowson, Sunbeam, through Mr. Cumming, learned that petitioner's patent application was still pending in the Patent Office; that no claims had been allowed and the Wilkin Device was not being commercially exploited. Sunbeam, through Mr. Cumming, also obtained from Widdowson a copy of the then current Wilkin patent application specification and drawings. In addition, Sunbeam, through Mr. Cumming, learned that the working model of the Wilkin Device was still in existence. (R. 230-243, 19, 20, 70, 221, 222). (PX 8-R. 399). (PX 9, 10-R. 400). (PX 11-R. 401). (PX 12-R. 402). (PX 13-R. 403). (PX 14-R. 404). (PX 15-R. 404). (PX 16, 17-R. 405). (PX 18, 19-R. 406). (PX 30-R. 413).

Thereafter, Sunbeam commercially marketed the Sunbeam PARTY GRILL in 1961. (R. 8, 71).

V. ARGUMENT AND AUTHORITIES

Where spying is carried on and the discloser does not know what is going on there cannot be any basis for requiring a confidential disclosure.

There is not a question of whether or not the Wilkin Device was novel to Sunbeam, due to the prior knowledge

and subsequent improper activities of the Sunbeam patent attorney employee. Improper means of discovery refutes any prior knowledge of what is sought. The activities of Sunbeam through the skilled Mr. Cumming, employed by Mr. Rose, Sunbeam's expert patent attorney in this field, with his prior knowledge of the Wilkin Device and patent application, his activities and concerns of patent application claim allowance and patent clearance, conclusively prove *novelty* to and *use* by Sunbeam.

A leading case is *Tabor* v. *Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889). A recent (1956) case in the Fourth Circuit is *Colgate-Palmolive Company* v. *Carter Products*, 130 F. Supp. 557, 230 F.2d 855. The Restatement of Torts was published in 1939, long after a considerable body of case law had been developed on the subject here at hand. It has been followed universally in this field. Sec. 757 of said text states:

> "One who discloses or uses another's trade secret without being privileged to do so, is liable to the other if
>
> (a) He discovered the secret by improper means."[4]

Section 759 states:

> "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."[5]

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4. Paragraph (b) of Sec. 757 of The Restatement of Torts sets forth the more common situation requiring a disclosure in confidence.

5. See the text on pages 10 through 13 re Section 757, and pages 23 and 24 re Section 759.

A recent case, and a remarkable one insofar as the facts therein when they are compared to the factual situation of the case at hand, is *Seismograph Service Corporation* v. *Offshore Raydist, Inc.*, 135 F. Supp. 342, 263 F.2d 5, 5th Cir. (1958). In the District Court action (Eastern Division of Louisiana, New Orleans Division), Judge J. Skelly Wright, District Judge, states on pages 354 and 355 of the opinion as follows:

> "(14-17) . . . *The robber baron morality of another day is no longer acceptable. Courts are insisting on increasingly higher standards of commercial integrity.* Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., supra; Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 54 S. Ct. 146, 78 L. Ed. 293; Franke v. Wiltschek, 2 Cir., 209 F.2d 493, 499; Allen-Qualley Co. v. Shellmar Products Co., D.C., 31 F.2d 293, affirmed 7 Cir., 36 F.2d 623; Id., 7 Cir., 37 F.2d 104. It has been long recognized that any patent obtained through fraud and dishonest dealings is unenforceable in a court of equity. Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., supra; Keystone Driller Co. v. General Excavator Co., supra; Pomeroy's Equity Jurisprudence, 5th Ed., §§ 385, 397, 401, 402a. *Now business information or trade secrets, not arising to the stature of invention, are protected.* Franke v. Wiltschek, supra; Smith v. Dravo Corp., 7 Cir., 203 F.2d 369; Id., 7 Cir., 208 F.2d 388; Schreyer v. Casco Products Corp., 2 Cir., 190 F.2d 921; Matarese v. Moore-McCormack Lines, 2 Cir., 153 F.2d 631, 170 A.L.R. 440; Chesapeake & Ohio Ry. Co. v. Kaltenbach, 4 Cir., 95 F.2d 801; Hoeltke v. C. M. Kemp Mfg. Co., 4 Cir., 80 F.2d 912; Allen-Qualley Co. v. Shellmar Products Co., supra; Booth v. Stutz Motor Car Co., 7 Cir., 24 F.2d 415, Id., 7th Cir., 56 F.2d 962. *The fact that the business information is otherwise available is no defense. The improper acquisition itself creates the liability for damages.* Franke v. Wiltschek, supra; Smith v. Dravo Corp., supra; Vulcan Detinning Co. v. American Can Co., 72 N.J. Eq. 387,

67 A. 339, 12 L.R.A., N.S., 102; Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12. 'One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information.' Restatement of the Law of Torts, § 759.

(18) *Even where it cannot be said that the parties stand in confidential relations, impropor acquisition of another's business information or trade secrets subjects the perpetrator to liability in damages.* Restatement of the Law of Torts, §§ 757, 759. And a court of equity will enjoin the use of the business information or trade secrets so obtained. Franke v. Wiltschek, supra; Smith v. Dravo Corp., supra; Allen-Qualley v. Shellmar, supra. No single test can be applied in all cases where improper acquisition of business information is charged. The inventiveness of the devious mind staggers the imagination. *It is simply the difference between right and wrong, honesty and dishonesty, which is the touchstone in an issue of this kind,"* . . . (Emphasis added).[6]

A concise statement of the pertinent facts in the Seismograph case is as follows:

Hastings disclosed his Raydist System to Seismograph and Seismograph thereafter secretly started using information to build its own similar system. Hastings further disclosed to Seismograph the existence of a significant patent (Honore) without identifying the same, which patent anticipated his system and which would have to be acquired. Hastings also

6. This was approved by the Court of Appeals (5th Cir.), page 28 of its opinion, to-wit:

. . . "We felt that appellant's conduct in its business dealings with Hastings Instrument Company was so flagrantly inequitable as not to require legal citations, and that the principles and authorities had been amply discussed in paragraphs editorially numbered 14 through 18 of the district court's opinion, as found in D. C., 135 F. Supp. 342, 354-355, with which discussion we agree."

informed Seismograph that he had opened negotiations to acquire rights under said patent. Hastings' disclosures to Seismograph were made with the understanding that it was for the benefit of and in furtherance of a joint venture which was under consideration by the parties. Seismograph, after already having decided to terminate negotiations with Hastings for a joint venture, notified its skilled patent counsel in Chicago of the patent mentioned by Hastings and also the name of Hastings' Washington patent counsel and instructed its Chicago patent counsel 'That every effort be made to identify it so that the rights thereunder could be acquired.' Seismograph's Chicago counsel contacted his Washington associate patent counsel and fully briefed him on the status of Seismograph's System, the negotiations with Hastings, and the name of Hastings' Washington patent counsel. The Washington associate patent counsel of Seismograph's Chicago patent counsel contacted an employee of Hastings' Washington patent counsel and by 'deception, misrepresentation and concealment' learned the identity of the Honore patent in question. Thereafter, Seismograph acquired exclusive rights in the geophysical field under said Honore patent.

A concise statement of the pertinent facts in the case at hand is as follows:

In 1957, petitioner disclosed to Sunbeam the patent application specifications and drawings, as well as a working model of the "Wilkin Device". This disclosure was made with the understanding that some business arrangement between petitioner and Sunbeam might result therefrom. In 1958, after Sunbeam had already commenced working with a device structurally and functionally similar to the Wilkin Device, Sunbeam through its skilled patent counsel determined in considering patent clearance that it needed to obtain additional information regarding the Wilkin Device, including in particular whether or not

any claims had been allowed in the patent application. Sunbeam's patent counsel with no intention of entering into any negotiations with petitioner in reference to acquiring any rights in the Wilkin Device (R. 290) hired a private lay investigator to obtain the information Sunbeam desired from petitioner. The private lay investigator hired by Sunbeam used an alias and obtained by "deception, misrepresentation and concealment" the valuable confidential information which was desired by Sunbeam. Thereafter, Sunbeam used the information (R. 222) and marketed its device.

Sunbeam received, through its skilled patent counsel, the Wilkin Device (whether on a confidential or non-confidential basis is immaterial) in 1957, when it was contemplated by both parties that an agreement might result therefrom whereby Sunbeam would acquire rights under petitioner's patent application for some monetary consideration to petitioner. Later, in 1958, Sunbeam commenced work on a device which, in the opinion of its patent attorney was similar to the Wilkin Device. It was then determined by the same patent counsel to get confidential information concerning the Wilkin Device. To do this, Sunbeam's counsel did not contact petitioner or her attorney (whose names and addresses were available in Sunbeam's files) but instead hired a private lay investigator to obtain said information. The attorney for Sunbeam did not give the lay investigator the name of the attorney for petitioner. This lay investigator did not disclose his true identity and used an alias at all times, did not disclose the name of Sunbeam for whom he was acting and represented to petitioner at all times that he might be interested in buying rights under petitioner's patent application when, in fact, such was not true. The conduct of Sunbeam was far more reprehensible than that present in the situation of the *Seismograph* case, *supra*.

By "deception, misrepresentation and concealment," Sunbeam acquired from petitioner her trade secret, the Wilkin Device, and discovered confidential information concerning the same, to-wit:

1. The fact that no claims had been allowed to petitioner in her still pending patent application.

2. The fact that petitioner had not been successful in commercially exploiting the Wilkin Device.

3. Copies of the then current patent application specification and drawings of the Wilkin Device thereby disclosing to Sunbeam the Wilkin Device and that there had been no change in the same subsequent to the submission to Sunbeam on February 5, 1957.

4. The fact that a working model of the Wilkin Device was in existence and available to be demonstrated.

In the *Seismograph* case, it was shown by the evidence that Seismograph, through its own independent patent search, had discovered the Honoré patent. The important fact that Seismograph did not know was that this was the particular patent with which Hastings was concerned and Seismograph did not know this important fact until it learned the same through the "deception, misrepresentation, and concealment" of its patent counsel.

In the case at hand, even though Sunbeam knew of petitioner's patent application from 1957, it must be remembered the application pending in the Patent Office was confidential information in 1958. The status of the application, i.e., whether or not any claims had been allowed, whether or not any amendments had been made, whether or not it had been abandoned, and, in fact, *any* information about the application was a business secret of petitioner.

Now, we come to Sunbeam's position in 1958. Sunbeam had and was using a device which, in the opinion of its skilled patent counsel, could infringe patent claims allowed on the Wilkin Device, if, in fact any claims had been allowed. This patent counsel recognized in Sunbeam's device a combination of elements embodied in the Wilkin Device. Since the devices of Sunbeam and the Wilkin Device were different specifically, he was concerned with a patent claim in petitioner's patent application broad enough to cover all of the devices. Sunbeam would have been aware, as a matter of public record, if petitioner had been issued a patent, so it could only conjecture whether on the one hand petitioner had been allowed claims which it would infringe upon marketing or whether, on the other hand, petitioner's application had been abandoned. The patent counsel of Sunbeam made a determination that not only was the Wilkin Device novel to Sunbeam but was so novel that patent claims might have been allowed, and that the claims could be such that Sunbeam might subsequently upon issuance of the patent be infringing. (R. 224). This is also determinative of use. Sunbeam's concern was infringing a claim in a patent of the petitioner reciting exactly what they would be marketing. Sunbeam cannot be heard to explain otherwise. It is readily understandable why Judge Wright in the *Seismograph* case, *supra*, states:

> "The improper acquisition itself creates the liability for damages."

Seismograph's concern resulting in its wrongful taking, by its patent counsel was infringing claims in the Honore patent. Sunbeam wrongfully learned in 1958 that no amendments or changes had been made in the specification of petitioner's patent application, and thus no continuation or substitute application had been filed by

petitioner. Sunbeam likewise learned it faced no competition and would not face future problems of patent claim infringement of any claims then allowed to petitioner. Over and above all of this information, Sunbeam learned that petitioner still had the working model of the Wilkin Device in 1958. The information about the patent application and commercialization was admittedly useful to Sunbeam and undoubtedly so was the other information.

Summing up, Seismograph had knowledge of the Honore patent but wrongfully learned from Hastings' patent counsel that this particular patent was the one which Hastings had opened negotiations to acquire rights thereunder. Sunbeam, in 1957, obtained the Wilkin patent application specification and drawings and had witnessed a demonstration of a working model of the Wilkin Device. In 1958, the valuable information of and concerning the subject matter which they needed and did not have was exactly that which they wrongfully obtained through the private lay investigator. There is no question that Hastings' knowledge of the particular patent for which he was negotiating was his business secret. Likewise, there is no question that petitioner's knowledge that no changes or amendments had been made as to petitioner's patent application; that the same was still pending in the United States Patent Office; that no claims had been allowed therein; that petitioner had not been successful in commercially exploiting the Wilkin Device; that the working model of the same was still in existence and, that the trade secret Wilkin Device was the same in 1958 as it was in 1957, were petitioner's business and/or trade secrets. The improper obtaining and admitted using by Sunbeam make it liable. Relative the prior information obtained improperly, see the *Seismograph* case, *supra*, by Judge Wright: "The fact that the business information is otherwise available is no defense."

VI. THE COURT OF APPEALS DECISION

A. Conflict with the Fifth Circuit

The Court should review the applicability of the correct case law authority to the facts of this lawsuit as represented by *Seismograph Service Corp* v. *Offshore Raydist, Inc.*, 135 F. Supp. 242, 263 F.2d 5 (5 Cir. 1958). In footnote 5 the Court of Appeals states, "Seismograph . . . was an action to enjoin infringement of a patent obtained by fraudulent means. The language of the opinion upon which appellant relies was used in support of the Court's conclusion that the plaintiff therein had unclean hands and therefore was not entitled to relief." This is incorrect relative this case.

Relief as prayed was given counterclaimant in the *Seismograph* case on the points of persons and activity. The concern in both cases was the same, that of infringement of patent claims. Damages were not sought by the counterclaimant. See page 346 of the District Court decision. No loss of profits damages between the competing litigants could be proven, and counterclaimant only sought damages for patent infringement.

It is beyond question today that the basic distinctions between law and equity have been abolished.[7]

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7. The petitioner in the *Seismograph* case, *supra*, raised the question in reverse, and the circuit court at pages 27 and 28 answered: "Appellant forcefully urges that, 'it is to be noted that in this case of first impression in this Circuit the panel rendering the decision has laid down standard of business morals and ethics as a matter of equity jurisprudence where no equitable relationship between the parties was found to exist. The decision imposes obligations, existent only in confidential relationships, upon parties dealing wholly at arm's length, and thus hold serious implications in its disregard for this basic distinction in adjudging the business conduct of such parties.' We felt that appellant's conduct in its business dealings with Hastings Instrument Company was so flagrantly inequitable as not to require legal citations, and that the principles and authorities had been amply discussed in paragraphs editorially numbered 14 through 18 of the district court's opinion, as found in D. C., 135 F. Supp. 342, 354-355, with which discussion we agree."

The admitted "unclean hands" activity of the *Seismograph* case, *supra,* is activity amounting to "improper means", the case at hand. In the *Seismograph* case, *supra,* the relief given the counterclaimant Hastings was given because of the activity by the personnel of Seismograph Service Corporation. The same activity by the same kind of personnel for Sunbeam that is, skilled patent counsel and investigator, instituting and bringing about the obtaining of confidential information by "deception, misrepresentation, and concealment" must give rise to relief for the petitioner. The *Seismograph* case, *supra,* the circuit court decision, sets forth the surreptitious activity of Seismograph through the skilled patent counsel and investigator, page 15 beginning at the top of the second column through the first full paragraph in column 1 on page 21. This is the conduct referred to regarding "improper means" of obtaining information about trade secret business information. Please see the *Seismograph* case, *supra,* the district court decision at page 355, footnote "20" to paragraph "18":

> "The business information and trade secrets which Seismograph improperly acquired from Hastings include the following: . . . (b) the status of his pending patent application; (c) information on a significant background patent (Honore) which he was then negotiating for; . . ."

The latter information is what Judge Wright refers to when he states on page 354: "The fact that the business information is otherwise available is no defense. The improper acquisition itself creates the liability for damages." This is true because Seismograph knew of the Honore patent, but not that this was the patent Hastings wanted, and this was information obtained by the Seismograph skilled patent counsel and investigator, a Washington, D.

C. associate who approached Washington, D. C. counsel of Hastings.[8] The circuit court decision, pages 15-21, *supra*, tells the whole story re prior knowledge of the Honore patent by Seismograph. And, on this point, see the *Seismograph* case, the district court decision, *supra*, page 355, column 2, last sentence in the first paragraph:

> ". . . Indeed, Seismograph even stooped to espionage on Hastings' patent counsel."

Judge Wright in the district court decision in the *Seismograph* case, *supra*, page 354, quotes with approval the Restatement of the Law of Torts, Section 759, *supra*. The *Seismograph* case, *supra*, completely in line with the Restatement, as are all the cases cited by the petitioner, is ample authority in the law to grant review to the petitioner. There is a direct conflict between the Fifth and Tenth Circuits. Examining the elements essential for recovery under the Restatement, Section 759, *supra*, and the *Seismograph* case, *supra*, if the petitioner is not "a rival business interest" of respondent, it is only because of the size of the two, and the law has never denied protection to the weak or small. The "unclean hands" activity of Sunbeam in 1958 is certainly "improper means". Confidential "information" about petitioner's business was obtained in 1958 by Sunbeam by such "improper means". This information was procured by Sunbeam "for the purpose of advancing" its business interest and the information obtained was used by Sunbeam. See the record (R. 222):

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8. See the *Seismograph* case, *supra*, the district court's decision, page 349, column 2, last sentence of the first full paragraph: ". . . Mason congratulated Bailey on his excellent work, and on August 25, 1947, reported in full to Hawkins on the action which had been taken at the Patent Office to determine Hastings' interest in the Honore patent, and advised Hawkins that 'The Honore patent is definitely the patent in which they (Hastings) are interested'."

"Q. You considered this information, of course, useful to Sunbeam or you would not have obtained it, is this true?

A. What information is that, Mr. Fettis?

Q. The information you employed Mr. Cumming to obtain for you.

A. As to the commercialization or the allowance of the patent, yes, I did."

B. The Instructions of the District Court

The Court of Appeals calls attention to the admonitions contained in *Dunn* v. *St. Louis-San Francisco Railway, etc.*, 370 F.2d 682, 683 (10 Cir. 1966). The transcript of the afternoon session of the trial on May 27, 1965, Vol. VI, the material portions of which are in the record (R. 389-392) make it clear that the trial judge was thoroughly aware of the objections of petitioner to the instructions in question, thoroughly understood them, and did not give them or any instructions directed at the theory of the law of petitioner reflected thereby. Please see the record (R. 291):

"The Court: Well, go ahead. I may say to you with respect to this, your other two instructions are based on a different theory of the law than the court has accepted.

Mr. Fettis: I am aware of that.

The Court: And for that reason those two objections are overruled."

See Instruction No. 4 (R. 390) requested by petitioner and not given, and as it applied to requested Instruction No. 2 (R. 103), these instructions incorporating by reference petitioner's requested Instruction No. 1. (R. 103). These requested instructions of petitioner are the ones to which the trial judge referred, and about which he did not agree,

because he did not accept the "theory of the law" of petitioner based on the Restatement of Torts, *supra*, and the *Seismograph* case, *supra*. The trial court was completely aware of all this law, and evidence of the activity of Sunbeam in 1958 through its skilled patent counsel and investigator. Such had been completely briefed and argued to the trial Court by petitioner on motion for summary judgment. Besides, Sunbeam agreed to the procedure concerning the prior objections to the instructions of the trial Court before the jury retired.[9]

The Court of Appeals, on page A7 of the decision, the third full paragraph thereon, holds that the error alleged by petitioner, because the trial court refused to give three proposed instructions, could not have affected the jury's verdict. This is incorrect. The proposed Instructions No. 2 and No. 4 of petitioner incorporated proposed Instruction No. 1 of petitioner. These requested instructions of petitioner which were not given are as follows (R. 103 and 104):

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9. From the trial transcript, pages 782 and 783: "THE COURT: All right. Now let the record show that counsel have just reviewed all of the instructions that the court intends to give. I now inquire of counsel: Will you stipulate that any objections made as to the instructions which you have just reviewed may be considered as having been made after they are given and before the jury has retired. The rules provide that you may make your objections outside of the presence of the jury and may they be considered as, therefore, by stipulation as being made now for that time outside of the presence of the jury?

MR. FETTIS: We will so stipulate that the objections we are to give now shall be so treated.

MR. FOULSTON: The defendant so stipulates, Your Honor.

THE COURT: All right.

The plaintiff may now interpose any objections that you have to the instructions."

The record (R. 389-392) then continues the proceedings.

"PLAINTIFF'S REQUESTED INSTRUCTION No. 1

In this case you are to determine the following ultimate facts:

1. Was the disclosure made by plaintiff to defendant in 1957 in confidence?

2. Was the subject matter disclosed to defendant novel to it at the time?

3. Did defendant use anything so disclosed to it in the Sunbeam Party Grill?

4. Did defendant, by improper means, obtain business information or trade secrets from plaintiff in 1958 and thereafter use the same?

PLAINTIFF'S REQUESTED INSTRUCTION No. 2

You are to make a finding one way or the other in regards to 1, 2, and 3 of the preceding instruction, and if you find that the disclosure in 1957 was in confidence, that what was disclosed was novel to the defendant at the time, and that the defendant used in its Party Grill anything which was novel to it and so disclosed by plaintiff, then you are to render a general verdict in favor of the plaintiff.

PLAINTIFF'S REQUESTED INSTRUCTION No. 4

You are instructed that if you find the defendant, Sunbeam Corporation did by use of improper means in 1958, after having prior knowledge of the Wilkin Device, and before it marketed the Sunbeam Party Grill, obtain from the plaintiff, business information or trade secrets relating to the Wilkin Device, then you shall render a general verdict for the plaintiff without regard to the issues as set forth in Instruction No. 2. You are further instructed that if you have found a general verdict in favor of the plaintiff

under the issues given you in Instruction No. 2 then this instruction may be disregarded.

Seismograph Service Corporation v. *Offshore Raydist, Inc.*, 135 F. Supp. 342, 263 F.2d 5, 5 Cir. (1958).

Colgate-Palmolive Company v. *Carter Products*, 130 F. Supp. 557, 230 F.2d 855, 4 Cir. (1956)."

The important instruction on the "theory of law" which the trial Court did not accept is the requested Instruction No. 4. The trial Court did not give any instruction of this nature at all. The theory of law of the trial Court is set forth in Instruction No. 19 (R. 113 and 114), which was the instruction to the jury setting forth only the issues of (1) disclosure in confidence, (2) of something novel to Sunbeam, and (3) use thereof by Sunbeam. The instruction is completely silent as to the 1958 activity of Sunbeam and "improper means". Petitioner's incorporated proposed Instruction No. 1 referred to this in numbered paragraph 4 as well. The other three numbered paragraphs in Instruction No. 1 set forth the elements corresponding to the Court's Instruction No. 19.

Petitioner's proposed Instruction No. 2 which was not given referred to the first three numbered paragraphs, and would have instructed the jury to give a verdict for petitioner if the three (3) questions were answered in the affirmative.

Petitioner's proposed Instruction No. 4, which was not given sets forth the theory of the law based on the *Seismograph* case, *supra*, and the Restatement of Torts, *supra*, as well as the other cases cited by petitioner, for example, *Tabor* v. *Hoffman*, *supra*, and this is set forth in the first sentence of proposed Instruction No. 4. Instruction No. 4 was necessary because petitioner could prevail and gain

relief on either theory of law, that is, the trial Court's as exhibited by the trial Court's Instruction No. 19 to the jury and the numbered paragraph elements 1, 2 and 3 of the petitioner's proposed Instruction No. 1, which was not given, and that theory represented by petitioner's proposed Instruction No. 4.

If petitioner had prevailed before the jury, and the jury had found (1) disclosure in confidence in 1957, (2) of something novel to Sunbeam and (3) use thereof by Sunbeam, then it would have been useless for the jury to consider proposed Instruction No. 4 of petitioner, which was not given, and the question of numbered paragraph 4 in proposed Instruction No. 1 of petitioner, which was not given. Petitioner needed only to win once. That is the import of the second and concluding sentence of the proposed Instruction No. 4 of petitioner which was not given. A finding for petitioner under petitioner's proposed Instructions No. 2 and the incorporated No. 1 would nullify and make unnecessary consideration of petitioner's proposed Instruction No. 4. However, a finding for respondent under petitioner's requested Instructions No. 2 and incorporated Instruction No. 1 would not make petitioner's requested Instruction No. 4 a nullity. The jury could then have found a verdict for petitioner in view of the beginning and first sentence of Instruction No. 4, reflecting the theory of law as set forth in the *Seismograph* case, *supra*, the Restatement of Torts, *supra*, and all case law which follows the Restatement of Torts. It is not true as the Court of Appeals says on page A8 of the decision, "If a finding for one of the parties would nullify the proposed instruction, it must follow that an adverse finding in favor of the other party would also nullify the proposed instruction." That such is incorrect is believed clear, without question, and it is believed that the Court should review in view thereof.

The only instruction given by the trial court to the jury which touched on the "improper means" activity of the respondent in 1958 was Instruction No. 14, footnote 10 on page A8 of the Court's decision, and this does not reflect the correct law as urged on the District Court. This instruction merely states that what Sunbeam did in 1958 can be considered along with all other facts and circumstances in determining "whether or not plaintiff disclosed something in confidence to the defendant". Any reasonable juror from this instruction had to believe that he had to find that petitioner made a disclosure to respondent in confidence sometime in order to be given relief. This is not true. Further, Instruction No. 14 is believed to be incorrect from the standpoint that it would convey an impression to a reasonable juror other than what was right and/or intended, or represented by correct law. It reads that the jury must find that Sunbeam had to be found to employ "improper means" in 1958 before the jury could consider what happened in 1958 to determine "whether or not plaintiff disclosed something in confidence to defendant". Certainly, the activity of Sunbeam in 1958 could be considered by the jury irrespective of whether or not the jury found the activity to be "improper means" or not. Instruction No. 14 was faulty in two principal aspects. It denied petitioner an opportunity for a verdict in view of the law of the *Seismograph* case, *supra*, the Restatement of Torts, *supra*, and all the case law following the Restatement. In addition, it perhaps took from petitioner the right to have the jury consider the activity of Sunbeam in 1958 at all, again against correct law.

C. Misunderstanding by the Court of Appeals

On page A3 of the decision, third paragraph, the Court states, "Appellee obtained the services of an investigator to determine the *status* of appellant's patent application.

. . ." (Emphasis added). It is important that the status of petitioner's patent application determined was "what claims have been allowed by the Patent Office." (PX 8-R. 399, PX 11-R. 401, and R. 221). With regard to the essential elements which petitioner is required to establish for proof for relief on one theory, this indisputable evidence points all one way and is susceptible of no reasonable inferences which sustain the position of respondent, in regard to the elements of (1) novelty to the respondent and (2) use by respondent. The points made by petitioner relative patent application claim allowance are that the activity by skilled patent persons acting for respondent is evidence which points all one way and is susceptible of no reasonable inferences otherwise, that what was disclosed by petitioner to respondent *was so novel to respondent that the respondent considered it possible that petitioner might have obtained a claim covering such in the patent application;* and such activity by such skilled patent personnel of respondent is conclusive evidence which points all one way and is susceptible of no reasonable inferences otherwise, that respondent had embarked upon a project to manufacture and distribute an electric party grill, which accomplished many of the same results as petitioner's device which therebefore had been disclosed and demonstrated to respondent, and that respondent thought *a patent claim might have been allowed to petitioner in the patent application which would read on the electric party grill of petitioner, which is conclusive of use by petitioner.*

In the same paragraph on page A3 of the decision the Court of Appeals finds, "The investigator used a registered assumed name, indicated he was personally interested, and that he had an undisclosed principal who was *interested*". (Emphasis added). Interested is not believed a fair way

to put it. The Court apparently overlooked that the investigator held out to petitioner, "I might even be interested in buying the patent application" (PX 10-R. 400, and PX 8-R. 399), when respondent had no such intention. Please see the record (R. 290), specifically the following:

> "Q. What do you mean 'arousing her hopes,' Mr. Rose?
>
> A. By making her think I was interested in purchasing her patent application.
>
> Q. Which you certainly were not?
>
> A. That is correct."

This was flagrant and willful misrepresentation on the part of the respondent to the petitioner, on which the petitioner relied to her detriment. Certainly, this is not, "Permissible under New York Statutes" by anyone, especially an investigator acting "without disclosing his connections with appellee".

The Court on page A3 of the decision, last paragraph, sets forth that, "The cases relied upon by appellant in her brief each involved the infringement of patents." The very first case cited in the brief of petitioner under "REMARKS AND THE LAW", and one of the leading cases in this field of the law, did not involve infringement of patents. The case is *Tabor* v. *Hoffman*, 118 N.Y. 30, 23 N.E. 12, and at page 13 is the following:

> ". . . The plaintiff's patent had *expired*, and all of the parts of the pump represented by the patterns had been for a long time on sale in the form of a completed pump. . . ." (Emphasis added).

Relative the mistaken analysis of the cases cited by petitioner as reflected by the Court's statement in the last paragraph on page A3 and the *Tabor* v. *Hoffman* case,

supra, it is believed that the law applicable to the case at hand needs review by the Court. The footnote 4 reference to Walker on Patents additionally indicates that infringement of the patent must be involved. This is not true. The novelty to the respondent need not be patentable novelty.

In addition to *Tabor* v. *Hoffman, supra*, please see the leading case of "*Smith* v. *Dravo Corp.*, (C.A. 7th, 1953) 203 F.2d 369, 373:

> 'We assume that almost any knowledge or information used in the conduct of one's business may be held by its possessor in secret. International Industries v. Warren Petroleum Corp., D.C. Del., 99 F. Supp. 907; Restatement, Torts, Sec. 757 (b) (1939). Of course, as the term demands, the knowledge cannot be placed in the public domain and still be retained as a "secret". Thus, plaintiffs would not be permitted to copy the design of a known device and claim that the copies are their secret. That which has become public property cannot be recalled to privacy. *However, this does not mean that the product must reach the stature of invention.* Shellmar Products Co. v. Allen-Qualley Co., 7 Cir., 36 F.2d 623; Booth v. Stutz Motor Car Co., 7 Cir., 56 F.2d 962; A. O. Smith Corp. v. Petroleum Iron Works Co., 6 Cir., 73 F.2d 531. *All that is required is that the information or knowledge represent in some considerable degree the independent efforts of its claimant. . . .*' (Emphasis added).

In the recent decision of *Imperial Chemical Industries, Limited* v. *National Distillers and Chemical Corporation*, (C.A. 2d, 1965) 342 F.2d 737, the Court reiterated the general rule at page 742:

> '. . . Properly read and applied these provisions do not remove this trade secret case from the operation of the *general principle* that *a trade secret* can exist in a combination of characteristics and components,

each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectible secret. . . .'

The Court continued at page 743:

'It is no defense in an action of this kind that the process in question could have been developed independently, without resort to information gleaned from the confidential relationship. . . .'

'Although the court went on to say that anyone is at liberty to discover the secret and use it thereafter with impunity, that fact does not excuse the obtaining of a secret by improper means or the inequitable use of the same.'"

Also see the Restatement of Torts, *supra.*[10]

Re the last two (2) paragraphs on page A4 of the decision, the three (3) "essential elements" required to establish a right to relief by petitioner, set forth in the first paragraph, were *not* recognized as the basic issues at all stages of the trial. The statement by the Court in the first sentence of paragraph 2 is incorrect. Please see the final pretrial order. (R. 87).

"It is therefore obvious that the issues to be tried are:

1. Whether anything was disclosed in confidence by plaintiff to defendant;

2. Whether what was disclosed was novel to *defendant;* and

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10. Comments, Volume 4: "A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not as requisite for a trade secret as they are for patentability."

3. Whether defendant used anything disclosed to it by plaintiff in the Sunbeam Party Grill." (Emphasis added).

* * *

"Plaintiff has filed an amendment complaint and issue has been joined thereon. It was, and is, plaintiff's contention that a new issue of law has arisen therefrom which issue was brought to the Court's attention by a motion for summary judgment which was overruled by the Court. The plaintiff still contends that an additional issue to those set forth hereinabove exists:

4. Whether the defendant by employing improper means in September and/or October, 1958, obtained from the plaintiff business information or trade secrets; if such finding results, then issues 1, 2 and 3 shall be thereby resolved in favor of the plaintiff."

Both respondent and petitioner have recognized throughout that petitioner need only establish that what was disclosed was novel to *defendant* (respondent). Petitioner has maintained since finding out during discovery in prosecuting the lawsuit of the activity of the investigator in September and/or October, 1958, that she *need not prove any disclosure in confidence to respondent to prevail.* In September and/or October, 1958, petitioner disclosed trade secrets and information concerning trade secrets to a man using an alias who did not disclose respondent as his principal. How can petitioner be held to be required to prove a disclosure in confidence to respondent in regard to what happened in September and/or October, 1958, when at such time petitioner did not make a disclosure at all to respondent? This is what is recognized in the Restatement of Torts, Section 757:

"One who discloses or *uses* another's *trade secret* without being privileged to do so, is liable to the other if

(a) He discovered the secret by *improper means.*"

This does not say anything about a disclosure in confidence. The only elements in question necessary for relief are use, novelty and obtaining by improper means.

The three (3) issues listed by numbered paragraph in the final pre-trial order (R. 87) were issues in the lawsuit from the beginning, and were set forth in the first pre-trial order. (R. 14). However, these three (3) issues pertained only to the lawsuit as originally filed and the disclosure by petitioner to respondent in 1957, whereat Sunbeam obtained information by proper means. The contentions of petitioner, which are before the Court, arose during discovery, when the surreptitious activity of Sunbeam in 1958 was uncovered. Petitioner could have prevailed on the three (3) numbered paragraph listed issues, if the jury had found them in favor of petitioner, which they did not. The jury was never instructed so as to be given an opportunity to find for petitioner on the contentions of petitioner as a result of the 1958 activity of respondent. It was and is the contention of petitioner that the indisputed evidence of the activity of Sunbeam in 1958 goes to the degree and question of proof required by petitioner, and proves all essential elements which petitioner is required to establish as a prerequisite to a right to relief. Further, what happened in 1958 alone makes Sunbeam liable to petitioner as a matter of correct law. The 1958 orientated indisputable evidence points all one way and is susceptible of no reasonable inferences which sustain the position of Sunbeam. The only answer Sunbeam has to the inferences of novelty to and use by Sunbeam arising from surreptitiously obtaining in 1958 from the pe-

titioner that no claims had been allowed in the pending patent application is that "some patent examiner had gone astray". Please see R. 224.

"Cross-Examination by Mr. Foulston

Q. One question, Mr. Rose. You had in your own mind already reached the conclusion, had you not, about the Wilkin application, as to whether or not there was anything patentable there or not?

Mr. Fettis: Just a moment. I will object to this as being beyond the scope of the direct.

Mr. Foulston: He inquired of him, Your Honor, as to why he had Mr. Cumming.

The Court: I will overrule your objection. He may answer.

A. I was convinced that there was nothing patentable in the Wilkin application and the basic reason for my inquiry was just on the chance that *some patent examiner had gone astray* and had allowed some claims." (Emphasis added).

Such a shallow reason is no evidence at all to sustain the position of Sunbeam. It might just as well have taken the position that it desired to find out as a matter of curiosity.

Also, in the last paragraph of page A4 of the decision the Court of Appeals states, "She (appellant) maintains the acquisition of *readily obtainable information* entitled her to relief if acquired by 'deception, misrepresentation, and concealment.'" (Emphasis added). The information obtained by Sunbeam in 1958 was not readily obtainable. This information obtained in 1958 by the hired investigator while not disclosing the principal Sunbeam was the fact that the patent application of petitioner was still pending in the United States Patent Office. (PX 11-R. 401). The fact that no claims had been allowed to pe-

titioner in the application at that time. (PX 11-R. 401). The fact that petitioner had not been successful in commercially exploiting the Wilkin Device. (PX 11-R. 401). The fact that a working model of the Wilkin Device was in existence and available to be demonstrated. (PX 13 and 17-R. 403 and 405). Also, Sunbeam obtained a copy of the pending patent application of petitioner, the written specification and drawings; the same as they were given in 1957.[11] The copy of the written specification and drawings of the *then pending patent application* described and depicted the Wilkin Device. (PX 11-R. 401). None of the information listed hereinbefore was "readily obtainable information". All of it was solely in the possession of petitioner and/or her attorney. None of the information was public information.[12]

The Court of Appeals misunderstood petitioner's cause of action. See page A8 of the opinion. Petitioner has never had more than one cause of action against respondent. The civil action of petitioner is a tort. What is the scope of the tort civil action? Like any tort petitioner had a right. Respondent had a duty. Respondent breached that duty. Petitioner suffered damage. The right of petitioner is to her Wilkin Device and the business information concerning same which was not public and held in

11. The investigator Mr. Cumming wrote, "I do not know exactly how it works and would be interested in obtaining a photograph of it or some descriptive matter on this cooker if possible." (PX 8-R. 399).

12. Section 122 of Title 35, United States Code, provides: "Applications for patents shall be kept in confidence by the Patent Office and *no information concerning the same* given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner." (Emphasis added).

confidence. The duty of respondent was to respect that right, and not use "improper means" to obtain it or confidential information concerning it, and use such. Respondent breached its duty to petitioner by its "improper means" activity through the skilled patent counsel and investigator in 1958 in obtaining it and confidential business information of petitioner, and using such. It is admitted both by petitioner and respondent that petitioner has suffered damage, the amount to be determined subsequently in an accounting procedure, if respondent is found liable. Petitioner had only one Wilkin Device and all confidential information concerned herein relates to such. The activity of respondent in 1958 was first discovered by petitioner during deposition discovery proceedings in the litigation. The facts of the activity existed long prior to the filing of the complaint by petitioner. The facts of the activity of respondent in 1958 were not and could not have been discovered before. The applicability of the 1958 activity of respondent goes only to the proof required of petitioner under the law to make the respondent liable.

THE PRAYER

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding same to certify and send to this Court a full and complete transcript of the proceedings had in the case numbered and entitled on its docket No. 8504, Kathleen K. Wilkin, Appellant, v. Sunbeam Corporation, Appellee, so that this cause may be reviewed and determined by this Court as provided for by statutes of the United States, and that the judgment of the said United States Court of Ap-

peals for the Tenth Circuit be reversed by this Court, and for such other relief as to this Court may seem proper.

EVERETT C. FETTIS
ROBERT C. ALLAN
One Twenty Building
Wichita, Kansas 67202
and
JOHN H. WIDDOWSON
306 Bitting Building
Wichita, Kansas 67202
and
DALE M. STUCKY
1600 Wichita Plaza Building
P. O. Box 997
Wichita, Kansas 67202
Attorneys for Petitioner